

आयकर अपीलीय अधिकरण।

**IN THE INCOME TAX APPELLATE TRIBUNAL
SURAT-BENCH, SURAT**

**BEFORE SHRI RAJPAL YADAV, JUDICIAL MEMBER
AND
SHRI AMARJIT SINGH, ACCOUNTANT MEMBER**

आयकर अपील सं./ITA.No.1991/AHD/2016

निर्धारण वर्ष/Asstt. Year: 2012-13

AND

आयकर अपील सं./ITA.No.715/AHD/2017

निर्धारण वर्ष/Asstt. Year: 2013-14

DCIT, Cent.Cir.3 Surat.	Vs.	M/s.Happy Home Corporation T.P., F.P.No.39, Shantikunj Nr.SD Jain School U.M. Road, Vesu Char Rasta Surat.
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अपीलार्थी/ (Appellant)		प्रत्यर्थी/ (Respondent)
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Revenue by :	Smt.Smita Nair, Sr.DR
Assessee by :	Shri Rasesh Shah, CA

सुनवाई की तारीख/Date of Hearing : 15/11/2018

घोषणा की तारीख /Date of Pronouncement: 15/01/2019

आदेश/O R D E R

PER AMARJIT SINGH, ACCOUNTANT MEMBER:

These are two Revenue's appeals against the orders of Id.CIT(A), Surat dated 2.5.2016 and 30.12.2016 for the Asstt.Years 2012-13 and 2013-14. Since assessee is same, we proceed to dispose of both these appeals by this common order.

2. First we take appeal of the Revenue in the Asstt.Year 2012-13.
3. In the grounds of appeal of the Revenue, the solitary issue involved is with regard to deletion of addition made under section 68 of the Act of

Rs.1,83,56,149/- made by the AO on account of unexplained cash credit under section 68 of the Income Tax Act, 1961.

4. Brief facts are that the assessee is a partnership firm engaged in the business of construction and development of real estate, particularly in housing projects. The assessee has filed return of income on 28.9.2012 showing total income at Rs.5,69,14,360/- after claiming deduction under section 80IB(10) of the Act. The case of the assessee was selected for scrutiny assessment and notice under section 143(2) of the Act was issued and served upon the assessee. The AO had noticed that assessee had accepted various unsecured loan during the year under consideration. On the basis of the details furnished, the AO has issued notices u/s.133(6) of the Act and also summons u/s.131 of the Act to various depositors to examine the genuineness of the transactions and credit-worthiness of the depositors. During the course of scrutiny proceedings, the Id.AO noticed that the assessee firm has received unsecured loan from various parties during the year, out of which, a sum of Rs.1,83,56,149/- received from the various parties were not substantiated by the assessee. While recording the statement, the following depositors denied knowing the assessee or having business transactions with the assessee.

Sr. No.	Name of the persons	Amount (Rs.)
1.	Mahendra K. Shah, HUF	181431
	Mahendra K. Shah	45144
2.	Pradipgiri B. Goswami	597446
	Pradipgiri B. Goswami HUF	520466
3.	Keshuparbat B. Goswami HUF	595925
	Keshuparbat B.Goswami	76833
4.	Bindiya Patel, Prop. of Soni Gems	16338904
	Total	18356149/-

5. Accordingly, the Id.AO issued a show cause notice to the assessee as to why unsecured loans given by these persons could not be treated as bogus and

unexplained. The assessee filed its reply point-wise which were recorded by the AO in page no.11 to 18 of the assessment order. The assessee has submitted that the unsecured loans were duly reflected in the income tax returns, balance sheet and bank statement of the depositors which they had not denied and the statement given before the AO were not fully correct. The assessee has also filed affidavits of all the said depositors wherein they have claimed that they have provided loan to the assessee from their own sources, which they could not explain in their statement because of various reasons. After examining the reply of the assessee, the AO found the same to be not convincing. The AO has not accepted the explanation and affidavits filed by the assessee on the ground that same were done after-thought at the instance of the assessee. Therefore, the AO has treated the aforesaid unsecured loan amounting to Rs.1,83,56,149/- as unexplained credit u/s.68 of the Act and added to the total income of the assessee.

6. Aggrieved assessee, preferred appeal before the Id.CIT(A). Before the Id.CIT(A), the assessee while reiterating the submissions made before the AO, made further written submissions dated 12.04.2016. These submissions have been reproduced by the Id.CIT(A) in his order. The relevant part of the submissions made by the assessee before the Id.CIT(A) reads as under:

'It is an undisputed fact that during the course of assessment proceedings, the appellant firm had furnished the following details and documentary evidences, in support of the unsecured loans accepted during the year under consideration, so as to discharge the onus cast upon it u/s. 68 of the Act, to prove the identity of the depositor, the genuineness of the transaction' and the creditworthiness of the depositors.

- (i) Name and Address of the depositors;
- (ii) PAN of the depositors;
- (iii) Confirmation of the depositors;
- (iv) Copy of IT Acknowledgement of the depositors;
- (v) Copy of Annual Account of the depositors; and
- (vi) Copy of Bank Statement of the depositors.

Thus, it can be appreciated in the event of the appellant firm having furnished complete details and documentary evidences, to prove the identity of the depositors, the genuineness of the transaction and the creditworthiness of the depositors, by the above documentary evidences, the onus as cast upon it u/s. 68

of the Act, stands fully discharged and therefore, as per the well accepted judicial principles, no addition could be made u/s. 68 of the Act, in respect of the loans accepted by the appellant firm.

In support of our aforesaid contention, we would like to place reliance on the following judicial pronouncements.

i) The Hon'ble Supreme Court in the case of CIT v. Orissa Corporation (P) Ltd. (1986) 159 ITR 0076 has held that where the assessee had furnished the name, address and PAN of the depositors and had also furnished other documentary evidences, the onus cast u/s. 68 of the Act stood discharged by the assessee and therefore, addition cannot be made u/s. 68 of the Act.

j) The jurisdictional Hon'ble High Court of Gujarat in the case of CIT v. Ambuja Ginning Pressing-& Oil Co. (P) Ltd. (2011) 332 ITR 0434 has held 'that all the depositors had furnished confirmations, complete particulars of payments, extract of bank, pass books and evidences of income and accordingly, the assessee has discharged its burden u/s. 68 of the Act and therefore, addition cannot be made, u/s, 68 of the Act.

ii) The jurisdictional Hon'ble High Court of Gujarat in the case of DCIT v. Rohini Builders (2002) 256 ITR 0360 has held that where the loans were received and repaid by assessee by account payee cheques and the assessee having established the identity of the creditors by giving their complete addresses, PAN, as well as confirmation, along with copy of returns filed by the creditors, addition u/s. 68 of the Act stood rightly deleted by the -Tribunal.

(iv) The jurisdictional Hon'ble ITAT, Ahmedabad, in the case of DCIT v. VKA Finance & Investment Co.(2015) 45 CCH 0014 (Ahd Trib) has held that once an assessee submits all assessment details of its creditors, then the primary onus of proving identity, genuineness and creditworthiness stands discharged and no addition u/s. 68 is warranted.

(v) The Jurisdictional Hon'ble ITAT, Ahmedabad, in the case of DCIT v. Gaurang Manibhai Patel (2016) 46 CCH 0036 (AhdTrib) has held that once the assessee discharged initial onus cast upon it and evidences and explanation have been furnished, no addition u/s. 68 can be made to the income of the assessee.

(vi) The jurisdictional Hon'ble ITAT, Ahmedabad, in the case of ITO v. Babulal Ramprasad Agaiysal HUF (2014) 40 CCH 0307 (AhdTrib) has held that the assessee furnished details of PAN of the creditors and explained that the transactions were, made through banking channel and that all depositors were existing tax payers and interest was also paid to the depositors after deducting TDS and loans were repaid in subsequent years through account payee cheques, addition, u/s. 68 o the Act cannot be made.

(vii) The Hon'ble High Court of Delhi in the case of Mod Creations (P) Ltd. V. ITO (2013) 354 ITR 0282 has held that the assessee had filed copies of returns, statement of income, balance sheet, P&L A/c. And bank statements, etc. of the depositors and affidavits of some of the depositors were also filed. Hence, the assessee had discharged the onus placed on it u/s. 68 of the Act and therefore, addition in the hands of the assessee is not sustainable.

(viii) The Hon'ble High Court of Calcutta in the case of CIT v. Sahibganj Beetle Cables (P) Ltd. (1978) 115 ITR 0408 has held that where the amounts of loan were received by; cheque and repayment Was also made by cheque through assessee's banter and confirmation of creditors along with their Income Tax File Numbers were furnished, the assessee discharged its burden ond ITO was not justified to reject the evidence and make addition u/s. 68 of the Act.

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(ix) The Hon'ble ITAT, Delhi in the case of Dr. Rajesh Sardana v. ITO (2004) 56 TTJ 0776 has held that when the identity of the lenders and their capabilities were doubtful, the loans were given by cheques and the assessee had discharged the initial onus cast upon him by furnishing necessary particulars, the addition u/s. 68 is liable to be deleted.

A copy of the aforesaid judicial pronouncements is enclosed herewith in Annexure-10 for the immediate reference of your honour.

In view of the aforesaid facts and the judicial pronouncements in support thereof, we most humbly submit that even in the present case, the appellant firm has duly discharged the onus cast upon it by furnishing all details and documentary evidences to justify the unsecured loans and hence, the same cannot be treated as unexplained cash credits and therefore, the addition u/s. 68 of the Act as made by the learned AO, needs to be deleted in the interest of natural justice and equity.

2. Other supporting facts and details to justify that the genuineness of the loans

During the course of personal hearing we had with your honour in the subject matter, your honour had asked us to furnish various further information, in respect of the said loans and in 'this regard, we submit as follows.

(i) Loans have been accepted as well as repaid through banking channel

It may be noted that all the loans under consideration have been accepted vide account payee cheques.

Further, most of the loans which have been added u/s. 68 of the Act, have even been repaid in the subsequent years, vide account payee cheques.

The detail of addition made u/s. 68 of the Act and the repayment of these loans in the subsequent years is given in the following table.

Sr. No.	Nome of the Person	Addition u/s. 68 in AY 2072-73	Vear of Repayment
1	Mahendra K. Shah-HUF	18,1431	A.Y. 2015-16
2	Mahendra K. Shah	45,144	A.Y. 2015-16
3	Pradipgiri B. Goswami	5,97,446	A.Y. 2016-17
4	Pradipgiri B. Goswami-HUF	5,20,466	A.Y. 2015-16
5	Keshuparbat B Goswami	76,533	-
6.	Keshuparbat B. Goswami-HUF	5,95,925	A.Y.2015-16 (Partly)
7.	Bindiya P. Patel (Prp. Of Soni Gems)	1,63,38,904 1,83,56,149	A.Y.2014-15

The ledger account of the aforesaid unsecured loans from the beginning upto till date along with a copy of our bank statement, highlighting all the relevant transactions of acceptance as well as repayment is enclosed herewith in Annexure-11 for the immediate reference of your honour.

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Thus, in the event banking channel, said loans. Source of source of the unsecured loans being accepted and repaid through here remains no point of doubting the genuineness of the said loans.

(ii) Source of source

'As regards the source of receipt in the hands of the respective depositors (i.e. source of source, at the very outset, we would once again like to draw the kind attention of your honour to the fact that unsecured loan of Rs. 7,63,38,904/- has been received by the appellant firm from a single depositor viz. Smt. Bindya P. Patel, Prop, of Soni Gems.

It may be noted that in the case of the said depositor, scrutiny assessment u/s. 143(3) has been completed by the ITO, Ward 2(3)(I), Surat, for the year under consideration itself, on 27-03-2015, wherein her-creditworthiness as also the source of funds in per hands stand duly accepted.

A copy of the assessment order u/s. 143(3) of the Act as passed in the case of the aforesaid depositor viz. Smt. Bindya P. Patel Prop, of Soni Gems has already been furnished in Annexure-1 of our earlier submissions.

Further, the depositors whose new loans received during the year have been added u/s. 68 of the Act have furnished a declaration explaining the source in their hands and a copy of the same is enclosed herewith in Annexure-12 for the immediate reference of your honour.

On going through the same, it can be seen that the source in the hands of the depositors for granting loan to the appellant firm, a/so stand duly furnished.

Hence, the above details and documentary evidences, dearly show that the genuineness of the transaction stand explained and established beyond doubt and therefore, the addition u/s. 68 of the Act as made by the learned AO needs to be deleted."

7. The Id.CIT(A) after considering the details and the explanation of the assessee and considering the order of the Id.AO, deleted the impugned addition made by the AO under section 68 of the Act. The discussion and finding of the Id.CIT(A) contained in the order are relevant for the adjudication of this issue, and therefore, we reproduce them as under:

"7. I have considered the facts of the case inter-alia, the findings of the AO, the contentions of the assessee and the judicial pronouncements relied upon. The brief facts of the case are that the appellant had accepted unsecured loans during the year, for which during the course of the assessment proceedings, the assesses furnished details relating to depositors like their name, address, PAN and other documentary evidences like confirmation, acknowledgement of return of income, balance sheet, P&L A/c., capital account and bank statement of the depositors. Accordingly, the appellant has claimed that it has satisfactorily discharged the primary onus cast upon it u/s. 68 of the Act to prove the identity of the depositors, the genuineness of the transactions and the creditworthiness of the depositors.

On the basis of the details and documentary evidences furnished by the assessee, the AO had issued notice u/s. 133(6).as well as summons u/s.131, to various depositors and due compliance was made by all such depositors before the AO. However, while recording the statement u/s. 131 of the Act, certain depositors as listed in Para 4.1 of this Order, denied knowing the assessee or signing the confirmation or having business transactions with the assessee and therefore, in the opinion of the AO genuineness and creditworthiness of these loans stood disproved.. As a matter of fact, the assessee was never given the opportunity to cross-examine these witnesses (depositors) and even copies of statements were also provided very late alongwith show cause notice. Accordingly, the assessee was asked to show-cause as to why the loans totaling to Rs.1,83,56,149/- as received from these depositors should not be treated as unexplained, cash credits u/s. 68 of the Act. In response to the show-cause notice, the assessee furnished affidavits duly notarized of the said depositors, wherein, they furnished clarifications on the contents of their statements recorded before the AO and also confirmed their loans given to the assessee. However, the AO considered the same as an afterthought and held the said loans as unexplained cash credits u/s. 68 of the Act and made an addition of Rs.1,83,56,149/- to the total income of the assessee.

The law is well-settled that primary onus of proving the nature and source of money found to have been deposited in books by an assessee is on him. Where nature & source of a receipt cannot be satisfactorily explained by the assessee, it is open to the revenue to hold that it is income of the assessee and no further burden lies on the revenue to show that income is from any particular source [Roshandi Haiti 107 ITR 938 (SC) & Kaiekhan Mohammad Hanif 50 ITR 11(SC)]

It is a well accepted law that Section 68 provides for fulfillment of 3 basic conditions viz. (i) Identity of the depositor; (ii) Genuineness of the transaction; and (iii) Creditworthiness of the depositor. Further, the primary onus to prove the fulfillment of these 3 conditions lies on the assessee. In the present case, it is an undisputed fact that during the course of assessment proceedings, the assessee has furnished the complete details of the depositors like their name, address and PAN and also furnished documentary evidences like confirmation, acknowledgement of return of income, balance sheet, P&L A/c., capital account and bank statement of the depositors. Thus, by furnishing these details and documentary evidences, the assessee has discharged the primary onus cast upon it to fulfill the 3 vital conditions as prescribed u/s. 68 of the Act. Therefore, on a cursory look, I am of the considered view that since, the primary onus u/s. 68 has been discharged by the assessee, the loan received by it cannot be held as unexplained cash credits u/s. 68 of the Act. This view is well supported by the following decisions of the Supreme Court, jurisdictional High Court of Gujarat, jurisdictional Tribunal and other Courts:-

- (i) CIT v. Orissa Corporation (P) Ltd. 159 ITR 0078 (SC)*
- (ii) CIT v. Ambuja Ginning Pressing & Oil Co. (P) Ltd. 332 ITR 0434 (Guj)*

- (iii) *DCIT v. Rohini Builders 256 ITR 0360 (Guj)*
- (iv) *DCIT v. VKA Finance & Investment Co. 45 CCH 0014 (And Trib)*
- (v) *DCIT v. Gaurang Manibhai Patel 46 CCH 0036 (And Trib)*
- (vi) *ITO v. Babulal Ramprasad Agarwal HUF 40 CCH 0307 (Ahd1Yitr)~*
- (vii) *Mod Creations (P) Ltd. v. ITO 354 ITR 0282 (Del)*
- (viii) *CIT v. Sahibganj Electric Cables (P) Ltd. 115 ITR 0408 (Cal)*
- (IX) *Dr. Rajesh Sqrdana v. ITO 86 TTJ Oil 6 (Del)*

7.2 Now, after discharging of the primary onus by the assessee, the AO needs to verify the fulfillment; of the 3 conditions of Section 68 and the 1st condition therein is the Identity of the depositors. In the present case, it is a fact on record that all the said depositors are having PAN and are also filing Income Tax Returns. Further, it is also a fact that the summons u/s. 131 of the Act issued by the AO to these depositors were duly served and these depositors also appeared before the AO in response thereto. Moreover, it is also seen that in case of one of the depositor viz. Smt. Bindya P. Patel (Prop. of Soni Gems) from whom loan of Rs. 1,63,38,904/-has been received was assessed under scrutiny u/s. 143(3) for the year under consideration itself i.e. A.Y. 2012-13. Thus, I am of the opinion that considering all these facts, the Identity of the depositors stands proved beyond doubt by the assessee and the same has not even been disputed by the AO. Thus, it could be said that first hurdle has been crossed successfully by the appellant.

7.3 In the present case, the AO has held that the 2nd condition i.e. the genuineness of the transactions, has not been proved by the assessee since, the depositors in their statement recorded u/s. 131 of the Act, have denied to have known the assessee having given any loan to assessee and have also denied to have signed the confirmations filed by the assessee. As against this, the assessee has contended that the various documentary evidences submitted before the AO clearly prove the genuineness of the transactions. In this regard, I have considered all the documentary evidences which were even furnished before the AO during the course of assessment proceedings. On verification of these documentary evidences, the following facts have emerged:-

(i) First of all, it is seen that the loan given by the depositors to the assessee are duly reflected in their respective balance sheet and the depositors have not denied the correctness of the balance sheets submitted before the AO. Neither AO doubted the authenticity of these B/Sheets.

(ii) Secondly, it is seen that the loans were received by account payee cheques through banking channel and the respective amounts are clearly reflected in the bank statement of the depositors accepted to be correct by them and even the AO has not made any adverse comment regarding their authenticity.

(iii) Thirdly, it is seen that the assessee has paid interest on these loans and has also deducted TDS thereon and this interest income and TDS is duly reflected in the Income-Tax Returns of the respective depositors.

(iv) Fourthly, it is seen that most of the loans have been repaid along with interest, in the subsequent years and these repayments are also through account payee cheques and through banking channel.

(v) Fifthly, during of appellate proceedings on my direction, evidences explaining the 'source of source' of impugned deposits were filed and it has been seen that before issue of cheques to assessee, no cash was deposited and source was either sale "proceeds or loans'.

Thus, the above facts as are evident enough from the documentary evidences to derive a conclusion that loan transactions had been entered between the assessee and the depositors were genuine. Therefore it is very much intriguing as to under what circumstances the depositors denied to have known the assessee and disowned the transactions with them despite the fact, that these transactions duly reflected in their balance sheet, bank statements and Income Tax Returns. This aspect relating to recording of the statement-of lenders vis-a-vis documentary evidence have been discussed at length in subsequent paras.

Further, I am of a considered view that the fact that the loans as well as the interest income and TDS thereon being reflected in the Income Tax Returns, balance sheet and bank statement of the depositors, clearly support the assessee's contention that the transactions are genuine. As a matter of fact, except 'oral testimony' of lenders before AO in their statements there is nothing positive or direct evidence to support the finding of the AO that deposits were bogus/ingenuine. Nevertheless, their subsequent 'affidavits' these lenders have made a 'U turn' and accepted these loan transaction as genuine. Thus, the adverse oral testimony is no more subsisting. Had these transactions been bogus, the same would not have been reflected in these documents belonging to the depositors and the depositors would not have shown interest income on these loans and paid Income Tax thereon and moreover, the loans would not have been repaid to them by the assessee. Most importantly there is no allegation against the assessee of giving cash for obtaining cheque.

Therefore, considering the facts and documentary evidences, I am of the considered view that the genuineness of the transactions clearly stand proved by the assessee with supporting documentary evidences, if appears to me that either the depositors could not properly understood the questions raised by the AO or stated wrong-facts for reasons best known to them or AO has misinterpreted the facts stated by the depositors. On face of it, I have noticed that Id. AO (may be deliberately) did not question about cheque payments, Return showing interest income & repayment of loan reflected in their books. AO also stop short in examining the Books of A/cs

of these lenders and harped on "knowing the assessee". In today's world it is quite possible not to know the loanee if my finances are handled by-- some other person which is the exact case here. In this regard, it is seen that in reply to the show-cause notice issued by the AO, the appellant has furnished clarifications on the confusing contents of the statement of the depositors and also furnished (sworn) affidavits (duly notarized) in support thereof. It is important to mention here that even though affidavits were filed before Id. AO on 23.03.2015, she neither cross-examined any of the deponents nor brought any positive evidence to disprove the averments made in the affidavits. It is settled law as held by Hon'ble Apex Court in the case of Mehta Parikh Vs. CIT (1956) 30 ITR 181 (SC) that contents of affidavits cannot be rejected without cross-examining the deponents. Obviously, Id. AO has consciously not cross-examined the deponents to avoid averments made in affidavits becoming final & undisputed. I have carefully considered the statements of the depositors, their affidavits and clarifications as furnished by the assessee during the course of assessment proceedings and these aspects are discussed and analyzed herein after so as to arrive at correct conclusions in the matter:-

(a) Mahendra K. Shah :

It is evident from the Ledger A/c copies that during the year, assessee has paid interest of Rs.81,431/- to Mahendra K. Shah (HUF) and interest of Rs.45,144/- to Mahendra K. Shah, Individual in respect of unsecured loans availed in the past. In support of explanation, the assessee has furnished the following documentary evidences for both the entities:-

- (i) Account Confirmation.
- (ii) Balance Sheet & Profit & Loss A/c.
- (iii) Copy of Income Tax Return.
- (iv) Respective Bank Statement.
- (v) Name, Address & PAN of depositor.

The AO recorded his statement u/s.131 wherein she has observed that this depositor is engaged in the business of cheque discounting wherein he takes bearer cheques from customers and makes payment to them in cash or through cheque or RTGS, after deducting his commission and accordingly; the AO has alleged that the loan given by this depositor is merely a cheque discounting transaction. In this regard, it seems that Id. AO has misconstrued the 'cheque discounting activity' and liken it to some illegal or unscrupulous activity. In fact, this type of activity is a general business practice by which businessman realized funds early by paying some discounting charges to the person engaged in "cheque discounting business. This system works on the principal of early realization of funds as against the time taken by banking channel. There is nothing illegal or objectionable about this activity. Nonetheless, Id. AO has not examined the issue in detailed manner by asking him the question about whether assessee obtained loan by this modus operandi and about the money reflected in the Balance Sheet of lender, income reflected in his return & TDS credit claimed by him against his taxability. Nevertheless, I agree with the appellant that the nature of business of the depositor cannot be made a

basis to allege that the loan given by him is not genuine, especially, when the documentary evidences prove the genuineness of the transactions. The AO has miserably failed to prove here allegation as to whether assessee used the route of 'cheque discounting' for obtaining loan. Thus, in my view the AO has drawn erroneous conclusion and alleged the loan to be non-genuine without having any supporting evidence to back up her allegation.

Further, this depositor had in his statement has said that he has no business or personal relation with the assessee and does not know the assessee and also denied the signature on the confirmation. Considering this statement, the AO held the loan to be non-genuine. In this regard, the said depositor in his affidavit has clarified that in the F.Y. he had booked flats in the i project Nandini-III as developed by the assessee for which he had given booking advance and as this booking was cancelled, the said advance was converted to a loan. The depositor has admitted that he is lowly educated, only 7th pass does not have any technical knowledge regarding accounts and taxation and that his brother, Shri Chetan Shah, looks after his accounts and Income Tax matters. It is clarified that he did not knew that the project Nandini-III was developed by the assessee viz. M/s. Happy Home Corporation and under these circumstances, he had denied to have known M/s. Happy Home Corporation or granted loan to it, since, as per his belief he had given booking advance to Nandini-III. Further, as regards signature on the account confirmation, the said depositor in his affidavit has clarified that the signature on the confirmation was done by his office staff under his absence and hence, during the course of recording of his statement, he had stated that he has not signed the said confirmation. There is no allegation of AO that either assessee or his employees forged the signature of lender. On going through the affidavit filed by the said depositor, there remains no ambiguity about the said loan transaction of Rs.5,00,000 (in individual capacity) and Rs.9,00,000/- (in HUF capacity) on which interest of Rs.45,144/- & Rs.81,431/- has been claimed during the year. All the issues brought out by the Id. AO in statement of lender have been satisfactorily explained by the lender through his affidavit. Besides this, preponderance of probability is in favour of the assessee to hold that impugned transaction was genuine & properly explained with regard to nature & source of deposit.

(b) Pradipgiri B. Goswami

During the year, unsecured loan of Rs.5,00,000/- each from Pardipgiri Goswarni in his Individual & HUF capacity was received by the assessee on which interest of Rs.20,466/- & Rs.76,833/- was paid. In support of explanation about nature & source, of such deposits, the assessee has furnished the owing documentary evidences for both the entities:-

- (i) Account Confirmation.
- (ii) Balance Sheet & Profit & Loss A/c.
- (iii) Copy of Income Tax Return.
- (iv) Respective Bank Statement.
- (v) Name, Address & PAN of depositor.

In the statement recorded before the AO, this depositor had also denied to have known the assessee firm and in this regard, in his affidavit the said depositor has clarified that he being not well educated, his financial and accounting matters are handled by his brother Shri Amritgiri Goswami who was not present at the time of recording of statement, hence confusion. Further, the depositor has clarified that his brother had informed him regarding the loan given to Shri Mukesh Patel however, he did not knew that the said Shri Mukesh Patel is "the partner" of the assessee firm viz. M/s. Happy Home Corporation and that the said loan was taken by Shri Mukesh Patel in the capacity of partner of the assessee firm. The explanation seems to me quite bona fide and acceptable because many a times when financial matters are handled by some other person, not knowing the loanee personally is not unusual.

As regards his denial in respect of the signature mentioned on the confirmation, the said depositor has clarified in his affidavit that he stays in a joint family with his parents, his brothers family as well his uncle Shri Dipak Goswami. The depositor has further clarified that the confirmation was signed by his uncle Shri Dipak Goswami who jointly stays with him and since, he was out of station, the uncle had signed the confirmation. There is no allegation of AO that either assessee or his employee has faked/forged. Although Shri Pradipgiri Goswami denied of having any loan transaction with M/s Happy Home Corp. but at the same time did not deny that cheques issued by him were signed by him & issued from his own bank A/c with Union Bank. Documentary evidences coupled with subsequent affidavit has clarified all the points raised by AO on the basis of oral testimony. The AO could not bring any cogent evidence to support her allegation that all these loan transactions were bogus in the light of fact that transactions are through banking channel & duly reflected in Books, Balance Sheet & Return of Income of the lender.

(c) Kesuprabat; Goswami

In this case, the assessee has received Rs. 5,00,000/- as loan from Keshuprabat Goswami HUF & paid interest of Rs. 76,833/-(after making TDS) to individual & Rs. 50,925/- to HUF. In support of explanation in respect of nature & source of deposits, the assessee has furnished the following documents-

- (j) Account Confirmation.*
- (ii) Balance Sheet & Profit & Loss A/c.*
- (iii) Copy of Income Tax Return.*
- (iv) Respective Bank Statement.*
- (v) Name, Address & PAN of depositor.*

The facts in respect of the statement of the depositor Shri Kesuprabhat Goswami are also similar to the facts in respect of Shri Pradip Goswami, whereby, the depositor Shri Kesuprabhat Goswami having studied only upto 1st standard has stated that his financial and accounting affairs were handled by his relative Shri Amitgiri Goswami who said to be having

complete knowledge about the loan given to Shri Mukesh Patel (partner of the assessee firm), but did not had any knowledge that the said loan was taken by Shri Mukesh Patel in the capacity of partner of the assessee firm. Further, in his affidavit, the said depositor has clarified that the confirmation was signed by his brother Shri Shantiparbat Goswami in his absence and under these circumstances, he had denied to have signed the confirmation. Interestingly, Id. AO has not alleged that assessee or his staff forged the signature on the confirmation given by lender. It is evident from the copy of Balance Sheet that outstanding balances due from M/s Happy Home Corporation are duly reflected in respective Balance Sheets of HUF & individual and interest income is offered for tax in the return of income and credit for TDS duly claimed. Bank Statement of HUF with Union Bank of India is reflecting the entry of loan through cheque without having any cash deposits. The depositors has claimed that he was doing regular business of diamond trading and offered income u/s 44AD of the Act. Although, in his statement recorded before AO he had denied of having any knowledge of such loan transactions done by HUF or Individual but never disowned as said documentary evidences not belonging to him. He rather in his affidavit has confirmed that said loan transaction and clarified about the wrong statement given before AO due to confusion & misunderstanding caused by absence of Shri Amitgiri Goswami (his brother in law) who was handling his financial matters. Nevertheless, oral testimony cannot have more weightage than the documentary evidence inter alia when witness was not cross examined and subsequent affidavit filed by the assessee has clarified all the points raised in the statement & show cause notice.

(d) Bindva P. Patel (Prop. Of Soni Gems) and Praful M. Patel

The assessee has shown receipt of unsecured loan of Rs. 1,50,00,000/- by cheque No 44752 dt 4.4.2011 of 1C1CI Bank in the name of proprietary concern of M/s Soni Gems of Smt. Bindiyaben P Patel. In order to explain the nature & source of deposits, the assessee has furnished the following evidences:-

- (i) Name, Address & PAN of depositor
- (ii) Account Confirmation
- (iii) Copy of Return of income (duly showing interest income & IDS)
- (iv) Audit Report with Final A/cs (B/S & P&L A/c) of M/s Soni Gems
- (v) Copy of Bank Statement of ICICI Bank

As regards the depositor Smt. Bindya P. Patel, she had stated that all her financial matters are handled by her husband Shri Praful M. Patel and accordingly, the statement of her husband Shri Praful M. Patel was recorded, who stated that in the proprietary concern of her wife M/s. Soni Gem, the business of trading of diamonds is carried out and around 30% of the transactions are in the nature of providing accommodating bills. Further, he had stated that he does not know M/s. Happy Home Corporation and he had no business transactions with the assessee firm, in view of these facts, the AO rejected the genuineness of the loan received from the depositor Smt. Bindya P. Patel (Prop, of Soni Gems).

In the notarized affidavit filed before AO, Shrf Praful M. Patel has clarified that since, the business of M/s. Soni Gerns was of trading of diamonds, he had stated that there were no business/trading transactions with the assessee firm. It is clarified that in his statement he had referred only to trading transactions i.e. purchase / sale and not referred to the sections of loans which had infact been entered into with the assessee firm. It has also been noticed from the statement that Id AO has all along referred only to "Business transaction" not to any "loan or advance transaction" and AO in Question No.19 has raised a leading question to the witness as to why transaction with M/s Nakshatra (Q 14) and M/s Happy Home Corp (Q-18) Shri Sandip Balvant Naik (Q. 16) should not be considered as "Billing transaction" to which no reply was given. In sum & substance, Id. AO led the witness to believe that Id. AO was meant to bogus billing of purchase/ sale and no reference was made to unsecured loan with M/s Happy Home Corporation. The interference drawn by the AO from the statement is totally out of place and not in accordance with the facts narrated in the statement, Nevertheless, in subsequent affidavit, Shri Praful M Patel has cleared all the misgivings if, any, arose from his statement before AO. Further, it has been clarified that he had a bona-fide belief that the name of the partnership firm of Shri Mukesh Patel is M/s. Happy Home Construction instead of the correct name of M/s. Happy Home Corporation and accordingly, in the balance sheet also the loan has been shown in the name of M/s. Happy Home Construction. On verification on relevant records, the contention of lender is found duly corroborated because in Schedule 5 : Loan & Advances (of M/s. Soni Gems) the amount of Rs.1,62,05,014/- has been shown against M/s. Happy Home Construction. Thus, AO having asked about M/s. Happy Home Corporation not about Happy Home Construction, confusion was bound to occur. Moreover, it has been clarified that he personally knew Shri Mukesh Patel who is the partner of the assessee firm viz. M/s. Happy Home Corporation.

Considering the above facts, I am of a considered opinion that in the present case, the depositors being lowly educated or semi literate could not understood the seriousness & implication of recording of statement and could been able to state proper facts before the AO and were unable to understand the questions raised by the AO in proper perspective while recording of their statements. Further, it is also seen that having the depositors denied to know the assessee and transactions with it in the light of the fact that documents e.g. Bank A/c, Return of Income & Balance Sheet showing the fact of loan granted by them, the AO did not pursue the matter any further and never sought their explanation or clarification, as to why they were denying the facts in spite of evidences that these transactions stood duly reflected in the Income Tax Returns, Balance Sheet and bank statement of the depositors. Thus, it gets established beyond doubt that on one hand, the statements of the depositors are not reliable being incomplete and full of incongruity and on the other hand, the AO has also not been able to properly appreciate the facts duly corroborated & established by documentary evidences proving the loan transaction.

It is a well settled law that though a statement is a very important piece of evidence, the documentary evidences clearly prevail over the oral statements, more particularly when it is shown that the statement has been made under different circumstances and therefore, such a statement cannot be believed to be final. This view is supported by the following judicial pronouncements.

- (i) Naghubhai Ammal v. B. Shama Rao AIR 1956 SC 1953*
- (ii) ACIT v. Anoop Kumar 94 TTJ 288*
- (iii) Pullangode Rubber Produce Co. Ltd. v. State of Kerala 91 ITR 18*

Thus, the correctness of the facts are required to be judged through the documentary evidences, which in the present case are very clearly show that the loans given are duly reflected in the balance sheet of the depositors, the acceptance as well as repayment of these loans is through banking channel which gets evident from the bank statements of the depositors, the interest paid by the assessee has been offered for tax in the Income Tax Returns of the depositors and credit for TDS having been claimed.

Further, in my view, by furnishing the affidavits of all the depositors the assessee has rebutted the onus has cast on it and the onus thus shifted to the AO and going strictly by the Rules of Evidence, the depositors become the hostile witness of the AO and thus, the statements of the depositors cannot be read without taking affidavits into consideration. This view is supported by the decision of the Supreme Court in the case of Prakashchandra Nahta v. Union of India & Ors 247 ITR 274 which has been followed by the High Court of Madhya Pradesh in the case of the said assessee as reported in 301 ITR 134. Further, similar view has also been taken by the ITAT, Hyderabad in the case of Hertz & Weaves Engineers (P) Ltd. v. ACIT 45 TTJ 290.

Further, it is seen that the AO has rejected the affidavits of the depositors for the reason that these affidavits should had been filed before her immediately after the recording of the statements. I do not agree with the observation of the AO in this regard. It is seen that after recording of the statement, a copy thereof was neither given to the depositors nor to the assessee but attached with show cause notice therefore, assessee has claimed that on receiving the copy of the statements after the issuance of the show-cause notice by the AO, the depositors were contacted and clarifications were sought from them. Moreover, the AO has rejected the affidavits of the depositors for the reason that the stamp papers of most of the affidavits have been purchased from a common stamp vendor and that the language thereof is also similar, have perused these affidavits and observation of the AO is far from true. Each & every affidavit contains different facts & narration without having any kind of stark similarities, of course legal language and format might be similar to some extent. I do not agree with the AO in this regard, since, as per law Substance gets precedent over

Form and therefore, the correctness of the affidavits are to be judged from the documentary evidences, and facts narrated therein which in the present case, support the contentions of the assessee. Buying stamp papers from same vendor does not prove anything against the assessee or does not adversely affect the truthfulness of averments made in affidavits.

In view of the above discussion, I am of the view that the evidential value of the documentary evidences and affidavit cannot be brushed aside on flimsy grounds because what is important is the facts narrated therein. Further, these documentary evidences very clearly show that the loans were given by the depositors to the assessee and same are duly reflected in the respective balance sheet of the depositors & assessee, the acceptance as well as repayment of these loans are through banking channel which is evident from the respective bank statements, the interest paid by the assessee has been offered for tax as income in the Income Tax Returns of depositors and credit for IDS duly claimed. Therefore, in view of these facts, I hold that the 2nd condition of Section 68 regarding the genuineness of the transaction, stands fully satisfied by the assessee.

7.4 Now coming to the 3rd condition regarding the creditworthiness of the depositors, it is seen that out of the total loans of Rs. 1,83,56,149/-, an amount of Rs.1,63,38,904/- has been received from a single depositor viz. Smt. Binda P. Patel (Prop, of Soni Gems). She has been filing her return of income and shown taxable income at Rs. 24,37,70/- in AY 2012-13. It is also seen that scrutiny assessment u/s. 143(3) has been completed in the case of this depositor by the ITO, Ward- 2(3)(1), Surat, for the year under consideration itself i.e. A.Y. 2012-13, wherein her creditworthiness was duly accepted. Further, it is seen that all the depositors are filing their Income Tax Returns, from wherein their creditworthiness is satisfactorily proved & explained. Moreover, on my direction, assessee also furnished details explaining even the "source of source" of loan transaction with lenders in their respective hands. Furthermore, the interest income earned from the loans advanced to the assessee has been offered for tax in the Income Tax Returns of the depositors and the IDS credit has also been duly claimed by them. During the appellate proceedings, Id. AR also collated the data from the ROI & B/S of respective depositors to establish their creditworthiness as under :-

Sr. No.	Name of the Person	Gross Total Income	Capital	Fixed Assets	Cash/ Bank balance
1	Mahendro K. Shah-HUF Mahendra K. Shah	2,01,314	9,55,685	--	2,52,615
		2,74,381	9,93,377	23,800	68,505
2	Pradipgiri B. Goswami Prodipgiri B. Goswam-HUF	4,75,695	1 9, 4 9, 062	23,800	3,21,120
		1,75,850 1,81150	8,33,055 9,55,572	-- 5,50,000	4,252 13,127

		3,57,000	77,88,627	5,50,000	17,379
3	Keshuparbat B. Goswami Keshuparbat B. Goswami-HUF	1,77,440 1,76,850	7,32,788 6,31,875	-- --	8,326 20,275
		3,54,290	13,64,663		28,601
4	Bindiya P. Patel Prop. of Soni Gems	24,37,706	40,36,543	32,98,723	47,026
		24,37,706	40,36,543	32,98,723	47,026

On the basis of above data, it is established beyond any doubt that depositors were having sufficient wealth and means to advance loan to the appellant. They were men of means & nothing adverse could be held against them.

Thus, considering, these facts, I hold that the 3rd condition regarding the creditworthiness of the depositors also stand fulfilled by the assessee.

8. Rationale behind the decision : Conclusion:

During the appellate proceedings, I have given my thoughtful consideration to various legal and factual contentions raised by the appellant which have impacted my final decision making of treating the impugned unsecured loans as explained. These are :-

(a) Burden of proof about the cash credits satisfactorily discharged

Sec. 68 creates a 'legal fiction' by which amount found credited in the books although not 'income' in real sense but the same can be brought to tax if assessee failed to satisfactorily explain the nature & source of it, same can be added as income. Law is well settled that primary onus is on the assessee to offer explanation about the nature & source of such credits. If assessee offers no explanation or explanation offered by the assessee is in the opinion of the AO is not satisfactorily, that sum may be charged to income tax as income of the assessee. Above ratio was laid down by Apex Court long back in *Kale Khan Mohammed Hanif Vs. CIT (1963) 50 1TR 1 (SC)*. There is popular doctrine of common law which says *Incumbit Probatio qui digit non qui negat* i.e. burden lies upon one who alleges and not upon who denies the existence of the fact.

However, in subsequent decision in the case of *CIT Vs. Mohnkala (2007) 291 ITR 278 (SC)* Hon'ble Court has held that it is true that the opinion of the AO for not accepting the explanation offered by the assessee is not satisfactory is required to be based on proper appreciation of material and

attending circumstances available on record. The opinion of the AO is required to be formed objectively with reference to the material available on record. Application of mind is sine qua non for forming the opinion.

As evident from facts of this case, appellant has produced all the corroborative and direct evidence to prove the nature & source of deposits. Learned AO has simply rested her conclusion on non specific & generic question raised while recording the statement. She did not ask specific & relevant questions about the books entries, cheques issued and amount shown as loan in the books / balance sheet of respective ledgers. On the basis of incomplete enquiry final conclusion were drawn by the AO. She failed to grill them as to why interest income is offered for tax and loan amount is shown in Their balance sheet if transactions are not owned up by them and most importantly what is the source of money advanced as loan. Possibility cannot be ruled out if the lenders have skeleton in their cupboard and to save his / her skin they deny the transaction out rightly despite being shown in their books / banks / return. Simple denial made by the lender cannot

put the burden; back on the assessee especially when cross examination opportunity was not provided to appellant and facts stated in subsequent affidavit remained uncontroverted. In view of documentary evidences & affidavits, the onus has shifted forth to the AO who failed to discharge the same by simply rejecting the affidavits solely relying on oral testimony of the witness. It is a common saying that man may lie but not the documents. Most importantly, learned AO has not impeached about the genuineness of these documentary evidences. In nutshell, it could be summed up that looking to the quality of evidences & attending circumstances, appellant had satisfactorily discharged its burden.

(b) Evidentiary value of documents vis-a-vis oral evidence (Statement):

In general terms evidence includes everything that is used to determine or demonstrate the truth of an assertion. Giving or procuring evidence is the process of using those things that are either (a) presumed to be true, or (b) which were proved by evidence, to demonstrate an assertion's truth. Evidence is the currency by which one fulfills the burden of proof.

In law, the production and presentation of evidence depends first on establishing on whom the burden of proof lays. Admissible evidence is that which a court receives and considers for the purposes of deciding a particular case. Two primary burden-of-proof considerations exist in law. The first is on whom the burden rests. In many, especially Western, courts, the burden of proof is placed on the prosecution. The second consideration is the degree of certitude proof must reach, depending on both the quantity and quality of evidence. These degrees are different for criminal and civil cases, the former requiring evidence beyond reasonable, the latter considering only which side has the preponderance of evidence, or whether the proposition is more likely true or false.

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Section 3 of the Indian Evidence Act, defines the evidence in the following words:-

- (1) All the statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry; such statements are called Oral evidence;
- (2) All the documents including electronic records produced for the inspection of the court; such documents are called documentary evidence;

Different forms of Evidence:

- | | |
|--------------------------|--|
| (a) Oral Evidence | (f) Hearsay Evidence |
| (b) Documentary Evidence | (g) Judicial Evidence |
| (c) Primary Evidence . | (h) Non-judicial Evidence |
| (d) Secondary Evidence | (i) Direct Evidence |
| (e) Real Evidence | (j) Circumstantial Evidence or Indirect Evidence |

Legal cases have decided the issue relating to which evidence is to be treated superior. In ordinary circumstances direct evidences & documentary evidence shall prevail over oral evidence because witness may tell a lie or humans are fallible who may not remember the facts correctly. In the present case, learned AO has placed undue or over reliance on the 'oral testimony' of the witnesses giving complete disregard to the direct & documentary evidences in the form of bank account, return of income, balance sheet & books entries, interest income reflected in return, TDS was made and repayment have been made in subsequent years by cheque. On a closer book of statement it is seen that witnesses have stated certain facts therein which are contrary to the direct / documentary evidences. And most importantly, Id. AO has neither alleged these documents as bogus or unreliable nor proved them in genuine. Hence, it is for the person to prove that apparent is not real as held in the case of CIT Vs. Durga Prasad More (1971) 82 ITR 540 (SC). Hence, AO has to bring the evidence to prove that witnesses's statement was true & subsequent affidavit was to be disbelieved as evidence. Nonetheless, the statement of the witness was not allowed to be cross examined by the AO. At the outset, it has been held in various cases admission is not a conclusive piece of evidence which is rebuttable and should be proved by documentary evidence:-

- Naghablaw Ammai V.B. Shama Rao AIR 1 956 SC 1953
- ACIT Vs. Anoop Kumar (2005) 94 TTJ (Asr) 288
- Pullangode Rubber Produce Co. Ltd. Vs. State of Kerala 91 ITR 18 (SC)

Subsequently, affidavits were filed by the appellant of respective lenders wherein they explained the circumstances under which statements were recorded and stated the true facts which are totally contrary to the earlier statement. Learned AO has summarily dismissed these affidavits as an

'after thought' & saying them as prepared at the instance of the appellant. Learned AO however, have not brought any positive material to support her such allegation, therefore, no credence can be given to such sweeping remarks. It is also a fact that neither of the witnesses were cross examined which is mandatory before disbelieving the averments made in the affidavits as held by Hon'ble Supreme Court in the case of Mehta Parikh & Co. V/s. CIT (1956) 30 ITR 181 (SC).

It has been held in numerous cases that if assessee is not allowed to cross examine the witnesses, then same cannot be used as evidence, Hon'ble Supreme Court in Sivrajbhan Vs. Harchandgiri (AIR 1954 SC 564) has held that the word evidence in connection with Law, all valid meanings, includes all except agreement which prove disprove any fact or matter whose truthfulness is presented for Judicial Investigation. At this stage it will be proper to keep in mind that where a party and the other party don't get the opportunity to cross-examine his statements to ascertain the truth then in such a condition this party's statement is not Evidence.

In Income Tax matters also in the following cases in absence of cross examination of parties, the assessment proceedings were quashed :-

- (i) Andaman Timber Industries Vs Commissioner of Central Excise Kolkata (SC) Civil appeal no. 428 of 2006
- (ii) Mrs. Hansa V. Vasoia Vs. ITO (1TA NO. 6417/Mum/2012)
- (iii) Prakash Chand Nahta Vs. CIT 301 1ITR 134 (MP) – Statement recorded behind the back of the assessee cannot be used against the assessee.

To sum up, Id AO erred in placing over reliance on the oral testimony of witnesses which was not even conclusive and subsequently even retracted by affidavits as against direct and documentary evidences. The approach of AO in admission of evidence was against settled legal principals. Hence I hold that oral testimony recorded by AO deserve to be ignored and documentary evidences along with affidavits to be given credence.

- (c) Sufficiency of documentary evidences filed In respect of Joan transaction

As discussed earlier the appellant has filed sufficient evidences to discharge his burden proof, the same facts are not repeated here once again. It has been hold in the following cases that assessee has duly established the genuineness of transaction (through banking channel), identity (parties are produced) creditworthiness (return of income / balance sheet/source of source filed) of the parties, AO cannot treat the unsecured loans as unexplained cash credits. This contention is supported by the following decisions :-

- CIT Vs. Daulatram Ravatmal 87 ITR 349 (S.C)

- *Dhirajlal Girdharlal Vs. CIT (1954) 26 ITR 736 (SC)*
- *Murlidhar Lahorimal Vs. CIT 280 ITR 512 (Guj)*
- *CIT Vs. Pragati Co-operative Bank Ltd. 278 ITR 170 [Guj]*

(c) Even 'source of the source' has been explained:

It is settled law that addition u/s. 68 of the Act cannot be made if source of source is not explained. Law is very clear that assessee is not required to prove the 'source of source' of cash credits. This proposition is well supported by the following judicial pronouncements –

- *S. Hastimal V. CIT 49 ITR 273 (Mad)*
- *Tolaram Daga Vs. CIT 59 ITR 632 (Assam)*
- *CIT Vs. Daulatram Rawatmal 87 ITR 349 (SC)*
- *Sarogi Credit Corporation Vs. CIT 103 ITR 344*
- *Nemichand Kothari Vs. CIT 264 ITR 254 (Guj)*
- *DCIT Vs. Rohini Builders 256 ITR 360 (Guj)*

Nevertheless taking abundant precaution, during appellate proceedings, learned AR of the assessee was asked to submit the evidences to explain the "source of source" out of which impugned loans was granted to the assessee. In response, the assessee filed the explanation vide letter dated 12.04.2016 by filing letters from said lenders explaining the source as under (Annx. 12):-

<u>Name of depositor</u>	<u>Amount</u>	<u>Source of Source</u>
1. M/s Soni Gerns Prop. Bindiya realized from P.Patel	1,50,00,000	Sale proceeds
M/s. Gurudev Corporation		
2. Pradipgiri B. Goswami (HUF) from M/s.	5,00,000	Sale proceeds
		Nishi Gems
3 Pradipgiri B. Goswami (Ind.) from loans &	5,00,000	Source explain
		advances
4 Keshuparbat B. Goswami (HUF) from loans &	5,00,000	Source explain
		sales proceeds

Therefore, even the 'source of source' is found properly explained and no cash was found deposited in Bank account before issue of cheque to the assessee. The Hon'ble Guwahati High Court in the case of Kothari Vs. CIT (2003) 264

ITR 254 (Gau) has held on a harmonious construction of section 106 of the Evidence Act and section 68 of the Act, held that it is not the burden of the assessee to prove the genuineness of the transactions between his creditor and sub-creditors nor is it the burden of the assessee to prove that the sub-creditors nor is it the burden of the assessee to prove that had the creditworthiness to advance the cash credit to the creditor from whom the cash credit has been eventually received by the assessee. If, therefore, further logically follows that the creditor's creditworthiness has to be judged vis-a-vis the transactions, which have taken place between the assessee and the creditor, and it is not the business of the assessee to find out the source of money of his creditor or of the genuineness of the transactions, which took between the creditor and sub-creditor and / or creditworthiness of the sub-creditor for these aspects may not be within the special knowledge of the assessee.

Further, in the case of Mod. Creations Pvt. Ltd. Vs. ITO (2013) 354 ITR 282 (Del) it has been observed that the position was clarified by the Hon'ble Delhi High Court and it was held that the burden u/s. section 68 of the I.T., which is placed on the assessee, shifts as soon as the assessee establishes the authenticity of transactions as executed between the assessee and its creditors. It is no part of the assessee's burden to prove either the genuineness of the transactions executed between the creditors and the sub-creditors nor is it the burden of the assessee to prove the creditworthiness of the sub-creditors.

Although, the assessee cannot be burdened with the responsibility of proving the source of the source still for abundant precaution details about the source of source were called for and nothing fishy has been noticed. In view of these facts, I am of considered view that Id. AO unmindfully rushed to the decision of treating the genuine unsecured cash credits on half-baked information extracted from the lowly educated witnesses. Action of the AO is neither sustainable on facts nor in law.

(d) Transactions were through banking channel:

It is often said that transaction by cheque may not be sacrosanct and assessee is required to prove all the 3 conditions i.e. identity, creditworthiness and genuineness of the transaction. However, transaction through banking channel is a very much important aspect to claim judge whether loan transaction was genuine or not. In this case, the assessee was even asked to submit details with regard to repayment of loans which have been furnished before me vide letter dated 12-04-2016 (Annx 11). Such details are as under:

(i) Loans have been accepted as well as repaid through banking channel

It may be noted that all the loans under consideration have been accepted vide account payee cheques.

Further, most of the loans which have been added u/s. 68 of the Act; have even been repaid in the subsequent years, vide account payee cheques.

The detail of addition made u/s. 68 of the Act and the repayment of these loans in the subsequent years is given in the following table.

Sr. No.	Name of the Person	Addition u/s. 68 in AY 2012-13	Year of Repayment
1	Mahendra K. Shoh-HUF	1,81,431	A.Y. 201 5-16
2	Mahendra K. Shah	45,144	A.Y. 2015-16
3	Pradipgiri B. Goswami	5,97,446	A.Y. 2016-17
4	Pradipgiri B. Goswami-HUF	5,20,466	A.Y. 2015-16
5	Keshuparbat B. Goswami	76,833	--
6	Keshuparbat B. Goswami-HUF	5,95,925	A.Y. 2015-16 (Partly)
7	Bindiya P. Patel (Prop. of Son/ Gems)	1, 63, 38, 904	A.Y. 201.4-15
	Total	1 ,83,56, 149	

The ledger account of the aforesaid unsecured loans from the beginning up to till date along with a copy of our bank statement, highlighting all the relevant transactions of acceptance as well as repayment is enclosed herewith in Annexure-11 for the immediate reference of your honour.

Thus, in the event of the unsecured loans being accepted and repaid through banking channel, there remains no point of doubting the genuineness of the said loans.

On the basis, of copies of ledger account and bank statement, it is proved beyond doubt that receipts of loan & repayment were through banking channel without having involved any cash transaction / deposits.

Various Courts/Tribunals have taken a positive view of the very fact that loans have been repaid by account payee cheque while determining the issue of genuineness of unsecured loans. Some of case laws are as under:-

- Anil Kumar Midha HUF Vs ITO 23 CCH 0719 (Jodh)
- Vijay Laxmi Printing Works Pvt. Ltd. Vs. DCIT 37 CCH 261 (Del)
- CIT Vs. Karaj Singh 79 CCH 0278 (P & H)
- Guruprema Enterprises Vs. ACIT 30 CCH 0017 (Mum)
- Yamuna Synthetics Pvt. Ltd. 23 CCH 0134 (Del)
- Parminder Singh Vs. ITO 22 CCH 0279 (chd)

(j) Lenders regularly assessed to tax:

The assessee furnished the copy of respective returns of income of lenders wherein interest income if duly found reflected. Lenders have been regularly assessed to tax. In the case of the major lender partly namely Smt. Bindiya P. Patel Prop. of Soni Gems, assessment u/s. 143(3) for AY 2012-13 has been completed by ITO, Ward 2(3)(1), Surat on 27-03-2015 wherein her creditworthiness as well as her source of funds were duly stood accepted. It is very naive to believe that even if a person who has shown total income of Rs. 23,37,706/- and paid taxes of Rs. 5,68,882/- in AY 2012-13 was not a bona-fide assessee and not having creditworthiness to advance loan to the assessee. Hon'ble Guwahati High Court in the case of Jalan Timber Vs-. CIT 223 ITR 11 has held that if assessee and creditors both have shown impugned amount in their income tax return, no addition u/s. 68 can be made if the returns of creditors have been accepted by ITO. As discussed above, the case of creditor has been accepted by the department.

In view of the above, learned AO was not justified to raise doubts about the creditworthiness of the creditors who have been regularly assessed to tax thus, creditworthiness is duly established with the help of the evidences.

Conclusion:

Thus, considering the facts of the case in totality, I hold that in the present case, all the 3 parameters as laid down u/s. 68 of the Act, i.e. (i) Identity of the depositors; (ii) Genuineness of the transactions; and (iii) Creditworthiness of the depositors, have been fulfilled by the assessee and therefore, the AO is not justified in treating the loans received by the assessee as unexplained cash credits u/s. 68 of the Act. Hence, the addition of Rs. 1,83,56,149/- made by the AO for unexplained cash credits u/s. 68 is hereby deleted.

Thus, the Ground of Appeal No. 1 of the assessee is allowed."

8. Before us, the Id.DR supported the order of the AO. He further submitted that in the statement of various lenders recorded on oath, they have denied having entered loan transaction with the assessee and they even stated that they did not know about Happy Home Corporation or its partners. They have also denied signing of any confirmation of the loan transactions.

9. On the other hand, the Id.counsel for the assessee relied upon the order of the Id.CIT(A). He also reiterated submissions made before the Revenue authorities. He further submitted that documentary evidences filed before the AO clearly demonstrate not only granting of loans by lenders to the assessee,

but also showed interest income earned by them from the assessee, which was offered for taxation in their return of income. Assessee has filed copy of income-tax returns; computation of income, balance sheet, profit and loss account/capital account and bank statement/pass book of each lender; which reflect that unsecured loans given to the assessee were genuine. Besides that the lenders have accounted interest earned on the loan in their return, and that credit for TDS wherever applicable has been claimed in the return income. Therefore, all the corroborative evidences undoubtedly prove the transactions of loans by the creditors. So far as statements of lenders before the Id.AO are concerned, the same have been denied by them in their subsequent affidavits. Such statements were recorded under some misconception and misrepresentation of facts by the Id.AO. The lenders came to know about the facts only when they got copy of such statements, and immediately thereafter, they filed affidavits amending their statements. It is submitted that all the depositors are assessed to tax and are duly filing their returns of income. Loans were given through account payee cheques and the interest on them were received by them and reflected in their return of income. Therefore, all three parameters stipulated under section 68 of the stands discharged by the assessee, and onus now shifted to the Revenue to prove otherwise, which they failed in all respects. The Id.CIT(A) has analysed all the details and after detailed discussion, both on facts and in law, justified the claim of the assessee, which therefore deserves to be upheld and the appeal of the Revenue is to be dismissed.

10. We have heard both the parties and perused the material on record carefully. During the course of assessment as directed the assessee has furnished the following details to prove the identity, genuineness of transaction and credit worthiness of the lenders:

- i) Names and address of the depositors;
- ii) PAN of the depositors
- iii) Confirmation of the depositors;
- iv) Acknowledgement of the I.T. return filed by the depositors;
- v) Balance sheet, P&L and Capital account of the depositors;
- vi) Bank statement of the depositors.

11. On the basis of the details furnished, the AO has issued notices u/s.133(6) and summons u/s.131 of the Act to the various depositors, however, as mentioned supra in this order, four of the depositors have denied knowing the assessee, and having business with the assessee. The assessee has responded that the unsecured loans were duly reflected in the Income-tax returns, balance sheet and bank statement of the depositors. The assessee has also filed affidavits of all the said depositors, wherein they have clarified that they have given loan to the assessee from their own sources and that while recording of their statement certain facts could not be properly explained by them on account of various reasons which have been duly clarified in the notarised affidavits.

12. It is also noticed that out of the total unsecured loan of rs.1,83,56,149/-, unsecured loan of Rs.1,63,38,904/- has been received by the assessee from a single depositor, prop. of Soni Gem and in the case of the said depositor, the scrutiny assessment u/s.143(3) has been completed by the ITO, ward-2(3)(1), Surat on 27.3.2015 wherein the credit-worthiness of the depositor was accepted. The AO has not disproved the material facts reported in the affidavits filed by the impugned depositors. Even the AO has not made any cross-examination of the deponents to disprove the averments made in the

affidavits. The Id.CIT(A) has elaborated in his finding the details of clarification given by all the depositors in their affidavits about the wrong statements given by them before the AO due to confusion and misunderstanding under the different circumstances. It is noticed that the AO has rejected the affidavits of the depositors without any verification and disproving the material facts reported in their affidavit. The AO has not brought any evidence to prove that the statements of the depositors were true and the subsequent affidavits were false. It is observed that the AO has not brought any positive relevant material to reject the affidavits of the depositors and neither of the deposits were allowed to be cross-examined.

13. It is also pertinent to note that the assessee has made repayment of the loans to the depositors through account payee cheques, details which have been noticed by the Revenue authorities in their respective orders. As observed earlier, the initial onus cast upon the assessee is to establish three things necessary to obviate the mischief of Section 68. Only when these three ingredients are established *prima facie*, the department is required to undertake further exercise. While going through documentary evidences submitted by the assessee, it can be said that the assessee has fulfilled all above conditions and discharged its onus. We find that the Id.CIT(A) has looked into these aspects; both on facts and in law, and considered material placed before him and satisfied that impugned loans advanced by the depositors are genuine and the addition is unjustified. He has lucidly explained on each and every aspect, and we do not find any infirmity in the order of the Id.CIT(A), which is upheld and the grounds of appeal of the Revenue are rejected.

14. Now we take appeal of the Revenue for the Asstt.Year 2013-14.

15. In this appeal, Revenue has raised seven grounds. However, main issue agitated by the Revenue is in respect of deletion of a set of additions made by the AO under section 68 of the Income Tax Act, 1961. Total of the disputed

addition involved is Rs.2,40,46,423/- representing Rs.1,06,66,943/-, Rs.63,37,753/-, Rs.21,41,727/- on account of alleged unexplained loans claimed by the assessee under section 68, and addition of Rs.49,00,000/- representing undisclosed income on the basis of a diary seized from third party. We proceed to dispose of this issue accordingly as under.

16. Briefly stated facts are that the assessee-firm has filed its return of income on 28.9.2013 declaring total income at Rs.4,48,41,970/-. The case of the assessee was selected for scrutiny assessment and notice under section 143(2) was issued and served upon the assessee. On scrutiny of the record, the AO noticed that the assessee has taken unsecured loans from the depositors for which the assessee has furnished details. Accordingly, for verification of genuineness of the said loans, notices under section 133(6) of the Act were issued to the parties. However, few notices issued to the depositors, which were eleven in number, were returned unserved and their details were noticed by the AO in page no.3 of the assessment order. Therefore, the AO issued show cause notice to the assessee as to why loan of Rs.1,06,66,943/- should not be treated as bogus. Assessee replied that out of eleven depositors, eight depositors have been repaid and only loans to the three depositors were outstanding. These three deposits could not appear because paucity of time. The Id.AO did not accept this contention of the assessee and treated unsecured loans to the tune of Rs.1,06,66,943/- as bogus and added to the total income of the assessee.

17. Similarly, in another set of addition amounting to Rs.63,37,753/-, the Id.AO on verification of details noticed that cash has been deposited in the bank accounts of the parties immediately before giving loan to the assessee. The AO doubted credit worthiness of the parties and sought explanation of the assessee in this regard. In response to that, the assessee filed confirmation, copy of IT return, balance sheet and bank statement of the depositors to demonstrate credit-worthiness of the parties. The AO was not satisfied with the explanation of the